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Held at the Palais des Nations, Geneva, on Wednesday, 12 July 2017, at 10 a.m.

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Jus cogens (*continued*)

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Present:

Chairman:	Mr. Valencia-Ospina (Vice-Chairman)
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Kolodkin
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

In the absence of Mr. Nolte, Mr. Valencia-Ospina, Vice-Chairman, took the Chair.

The meeting was called to order at 10 a.m.

Jus cogens (agenda item 7) (*continued*) (A/CN.4/706)

Mr. Cissé, commenting first on the criteria for identifying *jus cogens*, said that it might be possible to argue that there were four criteria, including the two cumulative criteria identified in the second report (A/CN.4/706). Given that the definitional elements contained in article 53 of the 1969 Vienna Convention on the Law of Treaties must be regarded as an interrelated, indivisible whole, the third criterion was the non-derogability which resulted from the peremptory nature of *jus cogens*. It was a vital element because, without it, *jus cogens* was meaningless and could not achieve its prime objective of protecting fundamental human values. Non-derogability was the element that enabled a peremptory norm to produce its full legal effects, made it a *sui generis* norm in the hierarchy of norms and distinguished *jus cogens* from and gave it precedence over *jus dispositivum* and customary law. It was therefore an independent and indeed the most decisive criterion for the identification of peremptory norms.

The fourth criterion, which might be described as the "equivalence of norms", stemmed from the portion of the sentence in article 53 which recognized that the norm in question could be modified only by a subsequent norm of general international law having the same character. Thus, if the new norm did not have the same character, it was void because it conflicted with the old peremptory norm. He therefore concurred with Mr. Murphy that that clause constituted a further criterion for the identification of *jus cogens*. That fourth criterion was as fundamental as the first three because, in the event of a conflict between peremptory norms, it would enable domestic or international courts to determine the norms which could be qualified as *jus cogens*. That criterion was well founded, because the first sentence of article 53 stated that any treaty which conflicted with a peremptory norm of general international law at the time of its conclusion was void. As soon as a conflict arose between an earlier peremptory norm and the new norm, the treaty in question must be automatically declared absolutely void.

On closer examination, however, what appeared to be a fourth criterion was not truly independent in that it could not be separated from the third criterion, since it simply buttressed the non-derogability criterion in the event of a conflict between two peremptory norms which did not have the same character. It could therefore be inferred that the third criterion, non-derogability, was in itself sufficient to prevent the formation of any new peremptory norm that was contrary to its predecessor. In other words, the condition set by article 53 that a peremptory norm could be modified only by a subsequent norm of general international law having the same character was intrinsic to the criterion of the non-derogability of any peremptory norm of international law. For that reason, the final conclusion must be that article 53 contained three criteria for the identification of *jus cogens*, namely that the norm in question was a norm of international law, that that norm was recognized and accepted by the international community and that it was non-derogable owing to its peremptory character.

While the Commission had been right to examine only *jus cogens* norms of international law in the report under consideration, and while he accepted that, if norms of *jus cogens* deriving from municipal law conflicted with them, international *jus cogens* norms would prevail, that approach would lead to a fragmentation of that branch of international law. As he took a monistic view of international law, according to which municipal and international law formed a whole and the two orders, albeit distinct in some respects, had points of contact, he was in favour of a comprehensive study of *jus cogens* deriving from both municipal and international law. The Commission's future debates on the topic would gain in value if a study was conducted on the relationship between municipal and international peremptory norms, because they shared the goal of protecting fundamental human rights and fundamental human values.

He proceeded on the basic assumption that the central purpose of *jus cogens* as a set of non-derogable norms was to protect the human being and that that protection was guaranteed by the State through its domestic law and by the community of States through international law. If the Commission accepted that both kinds of *jus cogens* existed, the

question arose of whether the express reference in article 53 of the Vienna Convention to a peremptory norm of international law was sufficient reason to conclude that that article excluded *jus cogens* norms recognized in domestic law. In his opinion, article 53 did not draw a clear-cut distinction between two kinds of *jus cogens* that could never be reconciled, because an international court which was called upon to rule on a conflict between peremptory norms would have to refer to State practice; in other words, to domestic law.

One example of the vital interconnection between all the peremptory norms protecting fundamental human rights concerned murder and similar crimes. In international law they were penalized in the context of war crimes, crimes against humanity and genocide, and no derogations were permitted from the provisions of international law covering such crimes. Similarly, in some African States, no exceptions to the prohibition on capital punishment were allowed, in view of the principle that, since all human life was sacred, the community must eschew killing a murderer as a remedy for his or her crime; spilling that person's blood would not right the wrong done to another human being. Some traditional communities in Côte d'Ivoire did not imprison their criminals, because the supreme punishment was to banish them from their community of origin. That traditional form of justice thereby recognized that no one could depart from the scrupulous observance of certain norms, which could be termed peremptory norms resting on ancestral custom. While international law embodied the notion of crimes against humanity for large-scale crimes, some traditional African societies spoke of crimes against the community in the case of murder and similar crimes, even when there was only one victim. The difference between the two legal orders was one of degree, not of nature. That analogy therefore confirmed the existence of peremptory norms of *jus cogens* in both municipal and international law. In that respect, he concurred with Mr. Park and Mr. Nguyen that peremptory norms played an important role at the national and regional levels. For that reason, it was necessary to adopt a more inclusive approach to those peremptory norms, so as to encompass customary and ancestral law, domestic law, regional law and international law. Peremptory norms of international law protecting fundamental human rights could be enriched by traditions, customs and cultures from around the world, and they in turn could learn a great deal from international law when certain matters concerning fundamental, imprescriptible, non-derogable human rights were at stake. A more thorough study of the interaction and analogies between the peremptory norms of domestic and international law would lead to a *lato sensu* interpretation of article 53 of the Vienna Convention, which would in turn enable the Commission to gain a holistic understanding of the notion of *jus cogens*. In fact, the distinction between the two kinds of peremptory norms was more theoretical than practical.

The study of *jus cogens* could not be confined to treaty law, because article 53 did not deal exhaustively with *jus cogens*. Peremptory norms could be identified in all the pertinent sources in customary international law, domestic or international case law, general principles of law and the fundamental values upheld by ancestral traditions, customs and mores. There were no legal obstacles to that approach, as was shown by the fact that general principles of law had originally been principles applied in the domestic law of civilized nations before being transposed by codification into international law. It was therefore quite conceivable that some *jus cogens* norms existing in municipal law could become peremptory norms of international law.

Statelessness was another example of an area in which international law could and must draw on national and regional experience in order to define peremptory norms. International law did not offer a satisfactory response to some issues which directly affected the protection of human rights and which could be deemed matters covered by peremptory norms of international law. It focused on crimes that shocked the conscience of humanity, but seemed to be much more subdued when it came to situations that did not involve bodily harm. Statelessness in fact constituted a grave breach of the fundamental human right to a nationality and to citizenship. Once a stateless person had no nationality, he or she was unprotected by any State from multiple forms of abuse, discrimination and inhuman treatment. Statelessness was therefore a violation of a peremptory norm when a lawful claim to nationality was denied.

The example of statelessness demonstrated the difficulty of establishing a hard and fast dividing line between domestic *jus cogens* and international *jus cogens*. Indeed, article 53 of the Vienna Convention did not seek to draw any such distinction, even though it expressly referred to the peremptory norms of international law. The domestic law of States applying Roman law and common law referred to the notion of public order, which was the equivalent of the notion of a peremptory or *jus cogens* norm in international law. As the American Law Institute had recognized, a peremptory norm was like a public-order imperative in municipal systems. That notion of public order reflected the imperative nature of a number of principles, norms, rules and fundamental values which society sought to protect, as it regarded them as peremptory norms of domestic law. The notion was embodied in all the constitutions of the world and in national legislation concerning matters where the vital interests of individuals or society were at stake. In order to defend such interests, no derogation was permitted and public prosecutors had to take action whenever public order was in jeopardy. Concerning regional *jus cogens*, if the 15 States members of the Economic Community of West African States (ECOWAS) followed the example set by the authorities of Côte d'Ivoire in simplifying the conditions for granting nationality and if they harmonized their laws on statelessness in line with the Abidjan Declaration on the eradication of statelessness, that might be conclusive evidence of the existence of regional *jus cogens* on statelessness.

Since article 53 of the Vienna Convention was extremely general, it would be incumbent upon domestic or international courts, as creators of law, to flesh out the notion of *jus cogens* by clarifying its scope, the principles applicable to it, its identification criteria, evidence of its existence and penalties for non-compliance with it. The courts would have to exercise that function prudently and progressively by relying on sources of domestic and international law and on their own case law. Thus, the establishment of a list of norms constituting *jus cogens* would be useful. Other peremptory norms such as the prohibition of slavery, apartheid, aggression, human trafficking, international terrorism, maritime piracy and statelessness could be added to the prohibition of genocide, war crimes, crimes against humanity, torture, cruel and inhuman treatment, the use of force, arbitrary detention, discrimination and *refoulement*, among others, since *jus cogens* was not set in stone. Peremptory norms must evolve in step with the progress made in expanding the protection of human beings and human life under international law. While the criteria for identifying *jus cogens* norms which were defined in the report were certainly relevant, they should be bolstered with a description of the content of a genuine peremptory norm, irrespective of whether its source was treaty law, international customary law or case law. For that reason, it was necessary to draw up a systematic list of the peremptory norms constituting domestic, regional and universal *jus cogens*, based on State practice and domestic and international case law.

As far as the title of the topic was concerned, it would be simpler to call it "Identification of peremptory norms of international law" because the Special Rapporteur's whole argument was confined to the identification of those norms. The term "*jus cogens*" could be defined in the introduction and should no longer appear in the title.

In draft conclusion 4, the elements which he had described earlier could be added to the two criteria already set forth therein, with which he agreed. The title of draft conclusion 5 should read "Sources of *jus cogens*", as the elements it contained defined the sources of *jus cogens*, which were the same as the sources of public international law. Draft conclusions 6, 7 and 8 could be amalgamated and added to draft conclusion 4, since they all dealt with acceptance and recognition as criteria for the identification of *jus cogens*. While that would certainly make draft conclusion 4 longer, it would have the advantage of covering all aspects of the criteria for the identification of *jus cogens* in a single draft conclusion, thereby avoiding repetition. The title of draft conclusion 9 should be amended to read "Evidence of peremptory norms", since that would encompass evidence of acceptance and recognition. It might be wise to contemplate a draft conclusion on the scope of *jus cogens*, as that would offer a systematic approach to the identification of the peremptory norms of international law. In that connection, it might be possible to draw up a non-exhaustive list of *jus cogens* norms, which could be added to gradually as courts ruled on cases turning on peremptory norms.

Lastly, he recommended the referral of the draft conclusions to the Drafting Committee.

Ms. Escobar Hernández said that she had difficulty in agreeing with the distinction made in the report between constituent elements (or criteria) of norms of *jus cogens* and descriptive elements that characterized the nature of *jus cogens*. The difference between descriptive and characteristic elements, on the one hand, and constituent elements, on the other, was insufficiently clear, except perhaps in respect of the Special Rapporteur's intention to segregate what he called the "hierarchy" of *jus cogens* norms and the substantive dimension of those norms (the values or interests of the international community as a whole) from the elements for identifying an existing *jus cogens* norm.

In that connection, she had serious reservations about the Special Rapporteur's separate treatment of the cumulative criteria set forth in article 53 of the Vienna Convention in order to define what constituted *jus cogens*. While the Special Rapporteur thought that they could be considered one by one, as each element fulfilled a different function, she did not fully agree that the first three elements — a norm of general international law accepted by the international community as a whole from which no derogation was permitted — could be disjoined from the fourth element – modification only by a subsequent norm having the same character — because there was insufficient justification for the proposition that the fourth characteristic had to do more with the effects of *jus cogens* than with its identification. On the contrary, it was intrinsic to the notion of *jus cogens* and, as such, should be included in draft conclusion 4, regardless of whether it might receive special attention at a later stage. Even if it was accepted that the fourth requirement was a mere effect or consequence of the definition of a norm as *jus cogens*, it would not be the sole effect. She still held that the Commission could not tackle the topic of *jus cogens* without a detailed analysis of the articles on responsibility of States for internationally wrongful acts, which referred to the consequences of a breach of a peremptory norm of general international law. At all events, she was not opposed to the Special Rapporteur's intention not to examine that fourth requirement until he dealt with the hierarchy of *jus cogens* norms.

Secondly, with reference to the notion of a norm of general international law, which was certainly of vital importance to the topic, she concurred with the Special Rapporteur that the notion of "general" should be based primarily on the general applicability of the norm, in the sense of the subjects to which it applied. However, it might be wise to qualify the use of that criterion in two ways, first by not ruling out the possible existence of regional *jus cogens*, and second by taking account of the fact that, in that specific case, general applicability might refer to applicability only in given contexts, which raised the issue of *lex specialis*.

The identification of a norm of general international law as a generally applicable norm was a valid approach, but would certainly have some major consequences to which some consideration should be given, in particular with regard to the kind of norms to be included in that category. While she agreed that, strictly speaking, only general or customary law rules and principles could be termed norms of general international law, she was not entirely convinced that they were the only generally applicable norms of contemporary international law, since there was no denying that, as other members of the Commission had pointed out, multilateral treaties were generally applicable, although they were not regarded as norms of general international law.

Nevertheless, while that conflation between the general nature and the general applicability of a norm appeared unacceptable in the abstract, she shared the basic idea expressed in draft conclusion 5, which distinguished between, on the one hand, customary rules and general principles of law as general norms capable of giving rise to a norm of *jus cogens*, and, on the other, international treaties as norms that could reflect a norm of general international law capable of giving rise to a norm of *jus cogens*. That idea should be further developed in two ways. First, a treaty rule, as an element of practice, could also generate, and not only reflect, a norm of general international law constituting *jus cogens*. Second, that generative role could also be played by other norms, such as some of the resolutions adopted by international organizations.

Jus cogens norms had an eminently substantive character stemming from the fact that they reflected and protected the values and interests of the international community. From that functional perspective, the requirement that a *jus cogens* norm should be a norm of general international law was central to the process of creating or identifying the norm. That connection was attenuated once the norm had come into existence, since at that point a *jus cogens* norm could be reflected in any legal norm without losing its character as such.

She shared the Special Rapporteur's view that the concept of the "international community of States as a whole" was essential for identifying the existence of *jus cogens*. The idea that a norm must be accepted by an especially large majority of States in order to be considered *jus cogens* should be emphasized more strongly, as that was one of the factors differentiating *jus cogens* from ordinary customary law. She understood the acceptance and recognition of *jus cogens* to refer not only to the fact that no derogation was permitted, but also to the requirement that the norm should be modifiable or derogable only by another norm having the same character. That, in her view, was the proper interpretation of what the Special Rapporteur called *opinio juris cogentis*, which could be formed only by the international community of States as a whole.

She agreed with other Commission members that some of the draft conclusions put forward in the second report were somewhat wordy and repetitive. The six draft conclusions could be reduced to five, which should concern, respectively, the criteria for identifying *jus cogens*; norms of general international law; the international community of States as a whole; acceptance and recognition of norms as *jus cogens*; and evidence of such acceptance and recognition. The Drafting Committee should revise the draft conclusions with a view to clarifying and simplifying them, avoiding repetition and focusing solely on the essential elements of the issues they covered.

As she had stated previously, draft conclusion 4 should include, as a separate criterion, the fact that a *jus cogens* norm could be modified or derogated from only by a norm having the same character. In draft conclusion 5, paragraph 1 was unnecessary and potentially misleading, and should be deleted. It was nonetheless important to explain what was meant by "general scope of application"; the commentary would be a suitable place in which to do so.

The repetitiveness of draft conclusions 6, 7 and 8 made it difficult to distinguish the two issues with which they dealt: the concept of the international community of States as a whole and the concept of acceptance and recognition. While the two concepts were closely related, it would be best, in the interest of clarity, to deal with them in two separate draft conclusions, which should emphasize, respectively, the subject (the international community of States as a whole) and the substance (non-derogability and modification only by a norm having the same character) of "acceptance and recognition". Those draft conclusions should avoid any reference to evidence, as that issue was addressed in draft conclusion 9, which could be simplified considerably. Some of the terms used in draft conclusion 9, such as "materials", should also be changed, as they did not seem to be in keeping with a text of that kind.

She agreed with the Special Rapporteur's proposed change in the name of the topic, provided that the words "(*jus cogens*)" were retained. She also found the proposed future work programme acceptable, with the reservations she had expressed previously with regard to the "effects" of *jus cogens*. Lastly, as she had stated at the Commission's preceding session, the compilation of an illustrative list of *jus cogens* norms should be a key component of the Commission's work; such a list would have great added value, regardless of the form it took in the draft conclusions. She was in favour of referring the draft conclusions to the Drafting Committee.

Ms. Galvão Teles said that her comments on the proposals put forward in the Special Rapporteur's excellent second report were based on the need to ensure consistency between the Commission's current work and its past work on the law of treaties, responsibility of States for internationally wrongful acts and fragmentation of international law. Her suggestions on the draft conclusions were intended to streamline them and did not concern points of substance.

The first issue she wished to raise was whether *jus cogens* norms reflected fundamental values. She shared the views that the Special Rapporteur had expressed in that regard at the Commission's sixty-eighth session, when it had discussed draft conclusion 3 (2), and she agreed that *jus cogens* norms protected the fundamental values of the international community, were hierarchically superior to other norms and were universally applicable. In her view, the protection of fundamental values was the key distinguishing feature of *jus cogens* norms; it explained why they were limited in number and were non-derogable. The unique character of *jus cogens* norms resulted not from their sources but from their content and their purpose of protecting values that the international community as a whole recognized as fundamental and thus non-derogable.

While that view was not shared by all scholars or expressly espoused by all international courts, it was the position taken by the Commission, as shown by its work on the law of treaties, State responsibility and fragmentation of international law. In its 1966 commentary to the draft articles on the law of treaties, the Commission stated that a rule acquired the character of *jus cogens* owing to the particular nature of its subject matter (commentary to draft article 50, para. (2)) and that rules of *jus cogens* were of so fundamental a character that any treaty conflicting with them must be considered totally invalid (commentary to draft article 41, para. (8)). In paragraph (7) of its commentary to article 12 of the articles on responsibility of States for internationally wrongful acts, the Commission stated that the obligations imposed on States by peremptory norms necessarily affected the vital interests of the international community as a whole. Lastly, conclusion (32) of the Study Group on fragmentation of international law recognized that a rule of international law might be superior to other rules on account of the importance of its content. She looked forward to receiving the Special Rapporteur's revised proposal for draft conclusion 3, which should retain the reference to the link between *jus cogens* norms and fundamental values.

Another issue was whether treaties should be categorized as part of general international law. There was no accepted definition of "general international law" and no unanimity in the literature as to whether such law only included customary international law or also included general principles of law and/or treaties. In paragraph (1) of its 1966 commentary to draft article 50 of the draft articles on the law of treaties, the Commission implied that general international law encompassed treaty law by stating that the prohibition, in the Charter of the United Nations, of the use of force was a rule with the character of *jus cogens*. Thus, multilateral treaties that had been ratified by all or nearly all States could be a source of *jus cogens*, although a treaty norm must also be recognized as non-derogable in order to be considered *jus cogens*.

The word "general" in the expression "general international law" referred to the scope of applicability, as noted by the Special Rapporteur, and not to the source of the norm. She therefore disagreed with the Special Rapporteur's conclusion that treaty rules *per se* should not be considered a source or basis of *jus cogens* norms. Draft conclusion 5 should be amended to indicate that widely ratified multilateral treaties could both reflect *jus cogens* norms and serve as sources of such norms. It should also characterize customary international law, general principles of law and general multilateral treaties as a "source", rather than a "basis", of *jus cogens* norms. She agreed with the two criteria laid down in draft conclusion 4 and with the indication, in draft conclusion 7 (3), that acceptance and recognition by all States was not required. In draft conclusions 7 and 9, alternatives to expressions such as "attitudes" and "materials" should be found.

Yet another issue was whether the consequences of *jus cogens* should be limited to treaty law or should also encompass the law of State responsibility and other fields of international law. The Commission had already addressed *jus cogens* in relation to both the law of treaties and the law of State responsibility, since *jus cogens* norms had special legal consequences in both fields. The proposal, in paragraph 93 of the report, to address the effects of *jus cogens* in other areas such as rules on jurisdiction would require further consideration.

Regarding the advantages and disadvantages of including an illustrative list of *jus cogens* norms, the Commission had already explored that issue in paragraph (3) of its 1966 commentary to draft article 50 of the draft articles on the law of treaties. However, that

commentary concerned a provision that had been intended to become, and ultimately had become, part of a treaty. In the context of the draft conclusions under discussion, such a list could provide added value. The Commission had included illustrative lists in several other contexts, such as paragraph (5) of its commentary to draft article 26 of the draft articles on State responsibility and conclusion (33) of the Study Group on fragmentation of international law. She was thus in favour of including an illustrative list based on the Commission's past work and on pronouncements by international courts and tribunals, together with a caveat that the list was not exhaustive.

In conclusion, she supported the Special Rapporteur's proposal to rename the topic "Peremptory norms of general international law (*jus cogens*)" and recommended that the draft conclusions should be referred to the Drafting Committee.

Ms. Oral said that she agreed with the Special Rapporteur that *jus cogens* constituted *lex lata*, although the topic was not free of controversy. The Commission should build upon its previous work in order to provide guidance on that very important aspect of international law. The Special Rapporteur's second report provided a good foundation for that endeavour.

With regard to paragraphs 20-30 of the report, which concerned the three aspects of *jus cogens* that were dealt with in draft conclusion 3 (2) (fundamental values, hierarchical superiority and universal application), she was in overall agreement with the draft conclusion. At the core of those norms that had attained the status of *jus cogens* lay a shared set of fundamental values of the international community. That view had been expressed in years past by a number of Commission members with regard to draft article 50 of the 1966 draft articles on the law of treaties, and even earlier in the 1953 report of the Special Rapporteur on the law of treaties, which referred to overriding principles of international law that could be regarded as constituting principles of international public policy. The fundamental values protected by peremptory norms had also been recognized in judicial decisions, including the International Court of Justice judgment in *Corfu Channel* and the International Tribunal for the Former Yugoslavia judgment in *Prosecutor v. Anto Furundžija*. Since it would be difficult to include the protection of fundamental values as a criterion for the identification of *jus cogens*, she supported its inclusion in draft conclusion 3 (2) as part of a general description of the nature of *jus cogens*, which could be elaborated upon in the commentary.

Draft conclusion 4 reiterated language from article 53 of the Vienna Convention and was somewhat repetitive in relation to draft conclusion 3 (1). She agreed with the Special Rapporteur that article 53 of the Vienna Convention should serve only as a point of departure. On the question of whether article 53 was composed of two or three criteria, Ms. Lehto and other Commission members had argued persuasively in favour of including, as a third criterion, the requirement that a norm of *jus cogens* should be one that could be modified only by another peremptory norm. She was reluctant to do so, however, as she had found no clear evidence that States or courts took that criterion into account in identifying *jus cogens*. While she understood the need to distinguish *jus cogens* norms from ordinary norms that were also non-derogable, the content of draft conclusion 3 (2) was sufficient to serve that purpose. She therefore supported the Special Rapporteur's proposed two-criteria formulation.

Regarding draft conclusion 5, there was no agreed-upon definition of "general international law", as noted by the Commission's Study Group on fragmentation of international law. Given the divergence of views in that regard, she wondered whether it was necessary to adopt any definitive understanding of what sources could give rise to *jus cogens*. For the purpose of identifying *jus cogens*, it was the second of the article 53 criteria — acceptance and recognition by the international community of States as a whole — that was determinative. However, she did not disagree with the identification, in draft conclusion 5, of customary international law, general principles of law and treaty law as forming part of general international law. While the Special Rapporteur, in paragraph 41 of the report, raised the possibility that the distinction made by the Study Group between general international law, on the one hand, and treaty law and *lex specialis*, on the other, might preclude rules of international humanitarian law from acquiring the status of *jus cogens*, the Study Group's conclusion (33) listed basic rules of international humanitarian

law as being part of *jus cogens*. It should thus be made clear that specialized regimes could also include norms of a peremptory character. In addition, regional *jus cogens* should not be excluded.

She agreed that customary international law and general principles of law could serve as a basis for *jus cogens*, as set out in paragraphs 2 and 3 of draft conclusion 5. The Special Rapporteur could nonetheless have given more examples of general principles of law that could be considered *jus cogens*. As Mr. Vázquez-Bermúdez had said at the Commission's 3372nd meeting, one such example could be found in the advisory opinion of the Inter-American Court of Human Rights in *Juridical Condition and Rights of Undocumented Migrants*. The mention, in draft conclusion 5 (3), of Article 38 (1) (c) of the Statute of the International Court of Justice seemed unnecessary; it might be preferable to refer only to "general principles of law" and provide further explanations in the commentary. The topic "General principles of law" was on the Commission's long-term programme of work and would be studied further in that context.

Regarding treaty rules, which were referred to in draft conclusion 5 (4), she agreed with Mr. Rajput's description, at the Commission's 3370th meeting, of how a norm could progress from treaty law to *jus cogens*, although she did not share his view that *jus cogens* must be based on all three sources (treaty law, domestic law and customary international law). She also agreed with what Mr. Kolodkin had said at the 3372nd meeting, to the effect that the sequence in which the criteria for *jus cogens* were deemed to have been met was not relevant, at least in respect of treaties.

The meaning of "accepted and recognized by the international community of States as a whole" was perhaps the most elusive part of article 53 of the Vienna Convention, yet it was also the most important criterion for identifying *jus cogens* norms. Draft conclusions 6 to 9 thus set out the core elements in that regard. The order of those draft conclusions was a little confusing; in her view, draft conclusion 7 (International community of States as a whole) should be placed first, as the other three draft conclusions all dealt with acceptance and recognition. Some of them could perhaps be merged to provide more clarity and less repetition.

She supported the content of draft conclusion 8 (1), but believed that its rationale was not fully explained in the Special Rapporteur's report. From a strictly grammatical standpoint, the wording of the definition of *jus cogens* in article 53 of the Vienna Convention was different from the well-established definition of customary international law. As had been noted in the literature, the Convention's drafters could have explicitly defined *jus cogens* as norms of customary international law that were non-derogable, yet they had not. Furthermore, as pointed out by Sir Michael Wood at the Commission's 3372nd meeting, the negotiating history of the provision, in particular the words "accepted and recognized", was addressed somewhat superficially in the report. In that respect, she did not feel that the statement by the Chairman of the Drafting Committee at the first session of the United Nations Conference on the Law of Treaties, which was quoted in paragraph 67 of the report, provided a definitive answer.

Judging from the language of article 53, it seemed that, unlike customary international law, on which *jus cogens* norms were largely based, such norms did not require the element of conduct or general practice. The words "accepted and recognized", which denoted the second criterion laid down in article 53, did not, therefore, refer to State practice. Rather, it was the opinion or *opinio juris cogentis* of States that was determinative, as reflected by the Special Rapporteur in draft conclusion 6 (2). Put simply, *jus cogens* did not require a double dose of customary international law.

As to draft conclusion 7 (3), which related to the term "international community of States as a whole", she agreed with previous speakers who had said that acceptance and recognition by "a very large majority" of States should be required, in line with paragraph 67 of the report. She also agreed that the words "as a whole" did not mean "all" States, as the emphasis was on the "international community of States" and not simply "States". The Special Rapporteur and other members of the Commission had been right to assert that the term "international community of States as a whole" referred not to the individual attitudes or opinions of States but to their collective attitude.

She was amenable to changing the title of the topic to "Peremptory norms of general international law (*jus cogens*)", as proposed by the Special Rapporteur, on the understanding that the words "*jus cogens*" would be retained in parentheses and that the title would not exclude norms under specialized regimes.

She was also agreeable to providing an illustrative, non-exhaustive list of *jus cogens* norms, on condition that the illustrative nature of such a list was made clear. To conclude, she recommended the referral of the draft conclusions to the Drafting Committee.

Mr. Peter said that he wished to congratulate the Special Rapporteur on his second report on the topic of *jus cogens*, which focused on the criteria or requirements for the identification of *jus cogens*. He sympathized with the Special Rapporteur and with Mr. Murase, the Special Rapporteur on the topic "Protection of the atmosphere", who had both faced pressure from the Secretariat regarding the length of their reports. It was regrettable that double standards were being applied, and he hoped that the Secretary to the Commission would look into the matter with a view to finding a permanent solution.

He had welcomed the inclusion of the topic on the Commission's long-term programme of work, as it provided an opportunity for people from developing countries to contribute in an area in which they had historically been marginalized. Indeed, when the Vienna Convention had been adopted in 1969, most countries in Africa had been in their first decade of statehood and had thus still been fumbling for direction in the international arena, as had many States in Latin America, Asia and the Caribbean.

Regarding the parameters of the topic, in paragraph 33 of the report, the Special Rapporteur explained that he would proceed on the basis of article 53 of the Vienna Convention, and provided five reasons for doing so. In his own view, the Special Rapporteur's approach was rather restrictive and might defeat the purpose of examining the topic in the first place. Given that the sources mentioned in paragraph 33 of the report were well known and that article 53 had been analysed extensively over the years, the purpose of preparing draft conclusions based solely on that article was unclear. He wondered whether it might be possible to look beyond the previous scholarship on the topic.

In paragraph 34, the Special Rapporteur declared his neutrality with regard to the topic and to article 53 of the Vienna Convention. It might well be wondered whether the Special Rapporteur's stance was realistic, whether his work would be somewhat artificial as a result, whether it was possible to be value-free and whether it would make more sense for the Special Rapporteur to take a position and then defend it.

In paragraph 31, the Special Rapporteur stated categorically that the issue of who determined whether the criteria for *jus cogens* had been met was "beyond the scope of the topic". The question that arose was why, having set out to identify the criteria for *jus cogens*, the Special Rapporteur would not go on to test them. The Special Rapporteur's approach was dangerous for a number of reasons. First, it might leave the door open for a State or group of States with similar cultures and histories to declare that a particular rule or principle qualified as *jus cogens* and to impose their decision on the rest of the world. Secondly, it might enable powerful countries to claim that their national practice was general and applied to everybody, implying that it represented an incipient *jus cogens* norm. For a topic of such importance, it made sense to indicate clearly not only the criteria for *jus cogens* but also who should determine whether those criteria had been met.

In paragraph 90, the Special Rapporteur proposed that, in the light of the Commission's debate during the sixty-eighth session, the name of the topic should be changed from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)". The debate in question was captured in paragraph 5 of the report, where the Special Rapporteur cited a statement by former Commission member Enrique Candioti, who had argued that the end users of the Commission's work might find the Latin term "*jus cogens*" unfamiliar or unclear when used in isolation. The Special Rapporteur had ultimately followed Mr. Candioti's suggestion to the letter. In any event, he personally would not stand in the way of the new name, but would prefer to concentrate on the content of the topic.

There appeared to be very little difference between the provisions of draft conclusion 4 and those of article 53 of the Vienna Convention. Similarly, he wondered

what fundamental difference, if any, there was between draft conclusions 4 and 6. In that connection, the Special Rapporteur should specify who was expected to assess the opinion of the international community of States as a whole, as required in draft conclusion 6.

In draft conclusion 7, the Special Rapporteur used a number of terms loosely. The references to "the international community of States as a whole" and "a large majority of States", in particular, warranted further explanation. Were the States in question in the same geographical area? Who determined whether a State did or did not belong to a given category?

It would be helpful for the various types of evidence of acceptance and recognition cited in draft conclusion 9 (2) to be listed hierarchically, as they differed widely in terms of nature, form and value.

In introducing the report at the Commission's 3368th meeting, the Special Rapporteur has sought the views of other Commission members, particularly new members, on whether it would be advisable to compile an illustrative list of *jus cogens* norms. In his opinion, the Special Rapporteur should provide an exhaustive list of every *jus cogens* norm in existence. He could fully understand why there might be opposition to such a list. Some *jus cogens* rules might be highly contentious, or skewed in favour of a particular part of the world, which could be a source of embarrassment. In truth, that was not a problem, bearing in mind that international law had never been neutral. An exhaustive list would serve as a "balance sheet" that would allow the Special Rapporteur to plan his work with certainty, since it would indicate not only what norms qualified as *jus cogens* but also their status and how they had come into existence. The list should be drawn up as soon as possible, and should, frankly, have been prepared at the outset of the Commission's work on the topic.

The future work programme required further thought. Unless he was mistaken, it was the first time since 1969 that the topic had been the subject of a thorough, scientific and holistic study. Consequently, the Special Rapporteur should not rush to finish, especially as there were many outstanding issues that called for his attention. The main one was who should determine whether the criteria for *jus cogens* had been met, an issue that, in his view, did not fall outside the scope of the topic. He urged the Special Rapporteur to rethink his road map, as rushing to address the consequences of *jus cogens* before completing the groundwork would be counterproductive.

The Special Rapporteur had done some tremendous work, venturing into rough terrain that was full of secrets, with many members not wanting to speak their mind openly or to have things called by their names. He recommended that all the draft conclusions should be referred to the Drafting Committee, which should refine them in line with the comments made by the members of the Commission. As there were many draft conclusions, with some of them expressing the same basic ideas in different words, it was clear that they needed streamlining.

Mr. Ouazzani Chahdi said that he wished to thank the Special Rapporteur for his well-documented and concise report on a topic that had given rise to numerous doctrinal discussions and had long been criticized for its natural-law connotations, lack of precision and potential effects, which, it had been feared, might be devastating for the stability of treaty relations. At the United Nations Conference on the Law of Treaties, some States had vehemently opposed the adoption of the notion of *jus cogens*, among them France, whose delegation had argued that such an imprecise concept would make disputes a permanent feature of the law of treaties.

Despite that opposition, and thanks to the codifying effect of the law of treaties, *jus cogens* had found its place in positive international law. It was the subject of articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, the provisions of which had been incorporated verbatim into the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

The Special Rapporteur's point of departure for his second report had been the observations and recommendations made by some delegations in the Sixth Committee. As noted in paragraph 11 of the report, most delegations that had commented on the scope of the topic had expressed the view that it should be broad and should cover areas beyond

treaty law, including the issues of State responsibility and immunity. Other comments made during the debate in the Sixth Committee had related to the need to rely on State practice in all its forms. He wondered, in that regard, whether that practice should have included national constitutions, some of which, including the Swiss Constitution, explicitly recognized the concept of *jus cogens*.

The characteristics of *jus cogens* mentioned in paragraphs 20-30 of the report were very interesting. The Special Rapporteur stated that *jus cogens* norms protected "fundamental values of the international community", but did not explain what was meant by "fundamental values". The Special Rapporteur should clarify the term and provide additional evidence to support his statement.

Regarding the hierarchical superiority of *jus cogens* norms, the Special Rapporteur used the conclusions of the work of the Study Group on fragmentation of international law and examples from national and international case law to substantiate his argument. A question arose as to the position that Article 103 of the Charter of the United Nations should occupy within that hierarchy.

The idea that *jus cogens* norms were universally applicable, in the sense that they applied to all States, should be developed further, particularly since, in principle, universality seemed to rule out the existence of regional *jus cogens*, which was recognized by some authors. Although the 1969 Vienna Convention did not provide for regional *jus cogens*, it was conceivable that highly homogeneous regional systems might produce peremptory norms specific to them. The existence of regional *jus cogens* would raise the question of how it related hierarchically to universal *jus cogens*. The Special Rapporteur should give some thought to the matter in his next report.

Chapter III of the report concerned the criteria for *jus cogens*. He agreed, in principle, with the Special Rapporteur's interpretation of article 53 of the Vienna Convention. Concerning the first criterion, namely that *jus cogens* were norms of general international law, the Special Rapporteur, based on the work of the Study Group on fragmentation of international law and on jurisprudence, reached the interesting conclusion that customary international law was the source of many *jus cogens* norms and that customary international law rules qualified as norms of general international law. He would like clarification of the assertion, in paragraph 41 of the report, that the distinction between general international law, on the one hand, and treaty law and *lex specialis*, on the other, precluded some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*.

The question as to whether general principles of law, within the meaning of Article 38 of the Statute of the International Court of Justice, could be a source of *jus cogens* depended on the rank assigned to them in the hierarchy of norms. Such principles were primarily of a national character; some of them could rise to the international level because they were shared by all nations, and an international court could, in a specific case, elevate them to the rank of *jus cogens*. The 1989 Convention on the Rights of the Child, for example, was based on principles to be found in many national constitutions, such as respecting the best interests of the child or the child's right to special care and assistance from the State. He agreed with the Special Rapporteur that the phrase "general international law" included general principles of law and that multilateral treaties could also serve as a source of *jus cogens* norms.

He endorsed the Special Rapporteur's analysis of recognition and acceptance as the second criterion for *jus cogens*, while noting that the bar should perhaps be set higher and another formula should be found to replace the "majority of States" requirement referred to in paragraph 67 of the report and in draft conclusion 7 (3). In paragraph 73, the Special Rapporteur presented non-derogability as a consequence of peremptoriness. That raised the question of what the difference was between a criterion and a consequence. In his own view, article 53 of the Vienna Convention set out three main criteria for peremptory norms.

He supported the Special Rapporteur's proposal to change the title of the topic, since the current title could give the impression that the Commission's work also included *jus cogens* norms of domestic law. That said, perhaps the Special Rapporteur could include some mention of those norms in the next report.

He endorsed the proposal made by other Commission members to merge draft conclusions 6, 8 and 9. If a non-exhaustive list of *jus cogens* norms was drawn up, it should be included in the commentary with an indication that its purpose was to further elucidate the concept of *jus cogens*. Lastly, he was in favour of referring all of the draft conclusions to the Drafting Committee.

Mr. Huang said that he agreed with the Special Rapporteur's proposal to rename the topic "Peremptory norms of general international law (*jus cogens*)" and supported the view that its consideration should not be limited to treaty law. He concurred with the Special Rapporteur that the study of *jus cogens* should be based on State practice, and emphasized that the Commission should pay greater attention to the reservations that had been expressed by States in the Sixth Committee, at the seventy-first session of the General Assembly, about the inclusion of the topic in the Commission's programme of work because they did not consider that there was enough State practice on *jus cogens*.

In his first report on the topic (A/CN.4/693), the Special Rapporteur identified the elements of *jus cogens*, in draft conclusion 3 (2), as protection of the fundamental values of the international community, hierarchical superiority to other norms of international law and universal applicability. Those elements differed sharply from the provisions of article 53 of the 1969 Vienna Convention and introduced new elements that were problematic on two accounts.

Firstly, they were not supported by State practice. In the process of identifying the core elements of *jus cogens*, nothing was more compelling and convincing than State practice. Yet the second report contained only a few examples of such practice, while the other examples of practice were drawn primarily from the judgments of international courts and tribunals. The extent to which those judgments reflected international acceptance was open to question.

Secondly, it was hard to distinguish the core elements of *jus cogens* from the criteria for *jus cogens*. In his second report, the Special Rapporteur referred to the core elements of *jus cogens* as descriptive elements, while labelling the criteria for the identification of *jus cogens* as constituent elements. Such a distinction was far-fetched and useless in practice. In paragraph 31, the Special Rapporteur noted that the criteria for the identification of *jus cogens* referred to the elements that should be present before a rule or principle could be called a norm of *jus cogens*. That implied that such elements did not exist before a rule became *jus cogens*. If universal applicability was a core element of *jus cogens*, then a rule was not necessarily universally applicable before it became *jus cogens*. Yet, in his own view, it was precisely a rule's character of universal applicability that could turn it into a *jus cogens* norm.

With regard to the premise that norms of *jus cogens* protected the fundamental values of the international community, the international judicial opinions cited in paragraph 20 of the report all referred to separate and minority opinions, and thus did not represent the mainstream perspective in judicial practice. In his view, the discussion of fundamental values could easily lead the Commission down the path of *jus naturale*, which the Special Rapporteur had consistently advised the Commission to avoid. Such a discussion also risked being ideologically biased; the Commission should therefore approach it with caution.

As to the element of hierarchical superiority, it was first necessary to clarify that the idea that general international law norms were void when they conflicted with a *jus cogens* norm referred to the effect of *jus cogens*. To infer hierarchical superiority on that basis was simply going too far. In fact, the view that any hierarchy existed in international law was not supported by State practice. Even though the concept of *jus cogens* had originated in domestic law, international law and domestic law belonged to two different legal systems, and further proof was needed in order to determine whether the theory of hierarchy in domestic law could be applied directly to international law. Even if a hierarchy did exist in international law, the statements of a few States and the judgments of some regional courts were not sufficient in themselves to demonstrate the hierarchical superiority of *jus cogens*.

He was in favour of including the element of universal applicability as a core element of peremptory norms of general international law. *Jus cogens* usually took the form

of a rule of customary international law. Thus, in order for a rule to acquire the status of *jus cogens*, it must be agreed upon by all members of the international community. For any rule to qualify as a *jus cogens* norm, whether it was a rule of customary international law, a general principle of law or a treaty rule, it must be endowed with the core element of recognition by all members of the international community.

In the proposed draft conclusions, the Special Rapporteur's approach of listing the two criteria for *jus cogens* — status as a norm of general international law and acceptance and recognition by the international community of States as a whole — in draft conclusion 4, while providing detailed descriptions of those criteria in draft conclusions 5 to 9, served as an aid to understanding but was somewhat cumbersome and repetitive. He suggested that draft conclusions 5 to 8 should be simplified and merged, with their core content moved to draft conclusion 4 and their non-core content moved to the commentary. Draft conclusion 9 as a whole should be moved to the commentary.

He generally agreed with draft conclusion 5, in which the Special Rapporteur listed the three possible sources of *jus cogens*. Unlike certain other Commission members, he saw no reason to exclude general principles of law from that list. That view was supported by the conclusions of the Study Group on fragmentation of international law, which indicated that the three main sources of international law were not in a hierarchical relationship to each other.

With regard to draft conclusion 7, his chief concern was about paragraph 3. Although he agreed that "international community of States as a whole" did not necessarily mean all States, the interpretation of that phrase as meaning "a large majority of States" was grossly inadequate. Indeed, that criterion was less stringent than the one required for the identification of customary international law and did not befit *jus cogens*, which had comparatively greater legal force.

The various forms of evidence listed in draft conclusion 9 (2)-(4) all corresponded to the materials needed for identifying customary international law. Since *jus cogens* norms had greater legal force than customary international law, it might be necessary to set a higher and more rigorous threshold for admitting evidence of acceptance and recognition of *jus cogens*. At the current stage of the Commission's work on the topic, it was not necessary to prepare an illustrative list of *jus cogens* norms. In conclusion, he supported the referral of draft conclusions 4 to 9 to the Drafting Committee.

The Chairman, speaking as a member of the Commission, said that the Special Rapporteur's second report appeared not to have carried through to its logical conclusion the considerable thought he had put into it. Overall, the report gave the impression that the Special Rapporteur had felt compelled to answer in the affirmative a question that had been put by a former Commission member concerning whether the future Commission would use only what States had agreed to as a touchstone for its work. He himself was of the view that the Commission should display greater vision in its work on *jus cogens*.

In order to do so, the Commission must critically reassess whether the criteria for determining which norms had attained peremptory status should be based solely on article 53 of the 1969 Vienna Convention. The Special Rapporteur's first report on the topic treated elements derived from practice and scholarship on the same footing as elements derived from article 53 and emphasized the fluid interplay between the nature, requirements and consequences of *jus cogens*. In contrast, what the Special Rapporteur referred to in his first report as the basic elements of *jus cogens* contained in article 53 were referred to in his second report as the criteria for the identification of *jus cogens*, while the other elements, listed in draft conclusion 3 (2), were relegated to the status of descriptive elements of established *jus cogens* norms. The justification provided for that choice was lean, consisting of two slender arguments that were set out in paragraphs 32 and 33. The first argument was that States wanted it that way, and the second was that most courts, tribunals, and scholars did too. Neither argument was entirely convincing.

Regarding the first argument, States' insistence on keeping to the definition of *jus cogens* enshrined in article 53 of the 1969 Vienna Convention seemed to be driven by the dogma that international law was made only by States. Yet the question of who decided what became law was also one of power. It was therefore not necessarily wise or productive

for the Commission to unquestioningly adopt the perspective of some vocally assertive States as though it were the state of the art in international law.

The second argument, that most courts and tribunals, as well as most scholarly writings on *jus cogens*, regarded article 53 as setting out the definition of *jus cogens*, was equally unconvincing. The right approach to international law was not a quantitative exercise. It was also worth asking whether the reliance on article 53 stemmed from a broad agreement on its value in defining *jus cogens* or merely from the fact that it was the most prominent definition of *jus cogens* in an international legal context. Furthermore, a number of academic review articles had concluded that there was not even agreement as to which of the approaches being followed to explain *jus cogens* was the predominant one. Consequently, even if the quantitative approach was accepted and the definition of *jus cogens* contained in article 53 was declared valid, such an approach would have to be substantiated in much greater detail.

He could not agree with the Special Rapporteur's assertion that the decision to turn the report into a commentary on the second sentence of article 53 was without prejudice to the understanding of *jus cogens* for the purposes of the Commission's work. That was reminiscent of the idea, expressed during the debate on the Special Rapporteur's first report, that adopting the article 53 definition meant adopting a firmly consent-based understanding of *jus cogens*. That understanding was not without its difficulties. In the first report, the Special Rapporteur highlighted the concern that States that had joined in the consensus on a norm might subsequently withdraw their consent at some point after the norm had become *jus cogens*, thereby damaging the consensus.

In the wider context of international law, the doctrine of State sovereignty and the connected paradigm of the indispensability of State consent for the creation of international law seemed to be very much alive. The default position for many approaches to international law-making was still that no State could be bound by a rule of international law unless it had consented to be bound. Such a consensualist approach appeared to be compatible with the definition of *jus cogens* contained in article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". While it was sometimes argued that acceptance and recognition were merely declaratory, and not constitutive of the existence of *jus cogens* norms, that definition was most commonly interpreted as suggesting that *jus cogens* was a special kind of customary international law that required State consent (in the form of *opinio juris*) for its creation.

The consensualist approach nevertheless raised a number of other issues. Even if *jus cogens* was regarded as a special kind of customary international law, examples of State practice for most of the norms assumed to be *jus cogens* were either lacking or contradictory. That situation was compounded by the fact that many norms assumed to be *jus cogens* demanded the avoidance of certain acts, leading to non-events or non-practice that then had to be interpreted. To overcome that difficulty, it had been suggested that the identification of *jus cogens* should be based on general principles rather than on customary international law. That approach retained the State consent element in the definition of particular norms of *jus cogens* but avoided the practice requirement. In the final analysis, however, any approach that embraced a State consent element left the rules of *jus cogens* to the discretion of States. A consent-based understanding of *jus cogens* could not provide a satisfactory explanation for the peremptory nature of *jus cogens* norms, could not distinguish *jus cogens* from other norms in international law, and ultimately remained a rather empty concept.

The report's focus on article 53 of the Vienna Convention made the considerations contained in the report seem ahistorical, as no information was given on anything that had happened in the field of peremptory norms prior to 1969. The report would have been more useful if it had discussed the historical background of *jus cogens*, both in order to assess whether relying exclusively on article 53 was indeed the most desirable approach and, if that was the case, to provide the background for a comprehensive interpretation of the elements it contained.

He was particularly uneasy about the content of draft conclusion 7 (3); the reasoning for its inclusion that was provided in the report was fairly meagre. Ultimately, it would mean that a State could be bound by a norm to which it had consistently objected. However, there was no persistent objector doctrine with regard to *jus cogens*, since universal applicability was a core element of *jus cogens* norms. That position was incompatible with the view that State consent was paramount in international law-making. To his mind, it was inconceivable that any norm should have to obtain unanimous support by all States in order to become peremptory.

Even if it was assumed that no State could be bound against its will, the term "large majority of States" should be clarified, given that the population of the five largest States in the world already accounted for roughly half of the global population. That raised the question of whether acceptance of the *jus cogens* status of a norm by a large majority of States that did not include the most populous ones was legitimate. Furthermore, it was possible for a norm on nuclear proliferation to attain a 95-per-cent acceptance rate without the agreement of any of the States possessing nuclear weapons. It was impossible to clarify those issues without looking behind the non-political façade of international law to unveil the hidden power relationships that shaped it. Those examples also illustrated why the term "large majority of States", without further qualification, made the ascertainment of *jus cogens* an arbitrary exercise. Taking the population of States into consideration would not solve the issue, as that criterion would effectively endow larger States with veto power.

He also questioned the merit of regarding the creation of *jus cogens* as a two-step sequence, involving first the establishment of a rule as one of general international law and then its elevation to *jus cogens* status. In view of the notable expansion of dynamic international law-making processes, subscribing to a static two-step sequence seemed counter-intuitive.

In paragraph 73 of his report, the Special Rapporteur emphasized that factual derogation from a norm did not prevent the norm from becoming *jus cogens*, since what should count was States' belief that the norm was non-derogable. Nevertheless, it was safe to say that, under the consent-based conception of *jus cogens*, a general congruence between the rules of *jus cogens* and the reality of State conduct with respect to them was necessary. A norm that was consistently violated by a significant number of States could not attain *jus cogens* status, even if those States still paid lip service to the norm.

The question of congruency pointed to another difficulty with the State consent-based approach to *jus cogens*: the interplay between State consent and the alleged capacity of *jus cogens* to protect or at least reflect fundamental values of the international community. It was not self-evident how State consent could form or shape those values, which were described in the first report as "concerned with the basic considerations of humanity"; whether or not those considerations really were defined by States was questionable. Furthermore, *jus cogens* not only had an effect on treaties but also reflected an aspirational dimension by setting goals for the treatment of individuals or for peaceful coexistence. A conception of *jus cogens* that merely reflected State practice forfeited that aspirational quality. In conclusion, he was in favour of the Special Rapporteur's proposal to change the name of the topic and of referring draft conclusions 4 to 9 to the Drafting Committee.

The meeting rose at 1.05 p.m.